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January 6,2003

VIA FEDERAL EXPRESS

Ms. Marlene H. Dortch
Federal Communications Commission
Office of the Secretary
9300 East Hampton Dr.
Capitol Heights, MD 20743

Re: CG Docket No. 02-278; In the Matter of the Rules and Reg's Implementing the Telephone Consumer Protection Act of 1991; Notice of Proposed Rulemaking

Dear Commissioners of the FCC:

Enclosed please find J. Greg Coontz' Reply to the Comments of Nextel Communications, Inc. pertaining to the above-referenced TCPA Rulemaking.

Sincerely,

J. Greg Coontz

Enclosure

cc: Ms. Kelli Farmer (w/four copies of enclosure) **VIA FEDERAL EXPRESS**
Federal Communications Commission
Room 4-C740
445 12th Street, S.W.
Washington, DC 20554

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Rules and Regulations Implementing the	)	CG Docket No. 02-278
Telephone Consumer Protection Act of 1991	)	CG Docket No. 92-90
	)	
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	)	

J. GREG COONTZ' REPLY TO THE COMMENTS OF NEXTEL COMMUNICATIONS, INC.

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INTRODUCTION

Nextel's Comment advocated two principle things about the TCPA's unsolicited fax ad ban: a) the retention of the established business relationship exemption; and b) the rewriting of the TCPA's definition of a "telephone fa[x] machine". This reply recognizes the fact that Nextel's fax advertising history and present legal exposure as a result of same are irrelevant to whether Nextel is correct in its substantive interpretation of the TCPA

Nonetheless, Nextel buttressed a number of its conclusions about what the TCPA means, or should mean, with references to itself as an "innocent bystander[]", who was "not even an advertiser" as its "only role in the matter was largely administrative". *Id*. at 39 & n. **84.** It was, therefore, Nextel that chose to place its status as an innocent bystander and the credibility of these statements before the Commission. Accordingly, in Section I, a small segment of Nextel's fax advertising history is addressed and a reply is made to provide more detail about the substance and nature of the litigation that Nextel is attempting to litigate before this Commission.

1. Nextel knowingly paid for more unsolicited fax ads (in Texas alone - in **1** year) than any other known fax ad **TCPA** violator in the history of America.

A. The undisclosed truth about Nextel's fax advertising history.

Nextel's Comment represented to this Commission that it was "an unwitting [TCPA] defendant" and a "responsible telemarketing [] compan[y]". *Id*. at 25 & 29. Nextel's own testimony and documents prove that:

a) Nextel was ordered to comply with the TCPA by this Commission in 1994;

b) Nextel's attorneys in 1999, in a nationally distributed memorandum, advised all of its Regional Marketing VP's that ***"NextelAND ITS DEALERS are subject to the TCPA";***

c) Nextel paid for and expressly approved the payment for, hundreds of thousands of unsolicited Nextel fax ads in 2000 alone (in the State of Texas alone);

d) two of the at least fourteen dealers that Nextel pre-approved fax ads for and paid for 100% of their blast fax campaigns were Nextel dealers Constant Communications and Direct Connect;

e) Nextel (attorney Frank Triveri – one of the attorneys on Nextel's Comment) represented to the Texas Attorney General in December, 2000, in response to a fax ad complaint that Constant Communications and Direct Connect "acted on their own initiative without Nextel's involvement" after Nextel pre-approved, post-approved and paid for the very fax ads Mr. Triveri was claiming Nextel was not involved with; and

f) Nextel's incorrect report to the Texas Attorney General was brought to its attention at a 2002 deposition and Nextel not only has taken no action to correct it, but instead has described itself to this Commission as "unwitting" and has blamed the "class action bar" for uncovering its additional below-listed false claims that it never knew about or conducted fax advertising and for exposing numerous below-identified Nextel sponsored, Nextel pre- and post-approved and Nextel paid-for fax advertising campaigns.

B. Nextel was **ordered by** this **Commission** to **comply** with the **TCPA in 1994.**

Since Nextel Communications (f/k/a Fleet Call, Inc.) creation it has been subject to oversight and regulation by this Commission. In fact, Nextel's most significant venture, digital phones, was the product of a 1991 FCC authorization. 9 FCCR 1411, In the Matter of Implementation of [various sections of the 1934] Communications Act, Regulatory Treatment of Mobile Services (1994) ¶ 7. See, excerpts of same marked as Exhibit "1".

Nextel filed both a Comment and Reply [Ex. 1, Appendix D] in this rulemaking and was one of the carriers subject to the order. Nextel was, therefore, on notice that it "must comply" with numerous sections of Chapter 5 of the 1934 Telecommunications Act, including the TCPA (47 U.S.C. §227) as well as the 68 year old law making common carriers liable for violations thereof by "person[s] acting for" them. 47 U.S.C. $217. See, Ex. 1, § 20.17(a).

C. Nextel's attorneys advise their nationwide marketing team that Nextel and its dealers are subject to the TCPA.

In 1999 – 7 years after the TCPA became effective and 5 years after being ordered to comply with it – Nextel in-house counsel drafted an "Inter-Office Memorandum" containing warnings about TCPA compliance directed to their Regional Marketing VP's, nationwide, who were in turn directed to provide this memorandum to the Nextel "indirect and direct dealers". See, Exhibit 2 (this document is bate-stamped "Nextel/Coontz []23" which establishes it to be a document produced by Nextel in the case where I serve as class representative).

This memo from the "Nextel Legal Department" in pertinent part states:

> Because ***Nextel AND ITS DEALERS are subject to the TCPA***
>
> . . .
>
> While there are a number of ***specific prohibitions in the TCPA that all 'persons", INCLUDING NEXTEL, are subject to,*** the following are the main prohibitions that affect Nextel, its direct ***AND INDIRECTDEALERS***
> **Unsolicited Facsimiles:** No person may use a telephone facsimile machine … to send an unsolicited advertisement to a telephone facsimile machine.
>
> . . .
>
> ***In light of the FCC's recent indication*** that it intends to enforce its existing guidelines, *it is especially important that local Nextel personnel* ***AND DEALERS*** follow these guidelines.

Exhibit 2, ¶¶ 2-4 (em. added)

Given that the evidence detailed below demonstrates that hundreds of thousands of fax ads were paid for and approved by Nextel's after this August 1999, memorandum, Nextel's attempt at compliance with the TCPA was either feigned or a miserable failure.

D. Nextel's Rampant Fax Advertising.

The Texas court that Nextel refers the Commission to' limited discovery in that case to

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[1] *Coontz, et al. v. Nextel Communications, Inc.*, et al.; in the 249th District Court of Johnson County, Texas; Case No. 200100349. In addressing this suit, Nextel did not mention that its scope is

Nextel fax advertising activity in Texas only. Hence, the facts referenced herein likely represent a very small percentage of Nextel's actual fax advertising history.

Attached hereto as Exhibit "3" is a document entitled "Index of 130Nextel Pre-Approval and Reimbursement Forms, **48** American Blast Fax Invoices and 10 ABF Advertising Agreements contained in Nextel's Files (IN TEXAS ALONE)". This document was submitted into evidence in the Texas state court proceeding and Nextel has never claimed it inaccurately summarizes hundreds of Nextel's own documents which demonstrate the extent of its fax advertising campaigns in Texas alone for the year 2000 alone.

A "Nextel Pre-Approval and Reimbursement Form" was used by Nextel to approve and potentially pay for advertising on Nextel's behalf conducted by its dealers. These single page forms represented both pre-approval (as Nextel would physically review the ad, make any necessary changes to it and then "pre-approve" same prior to dissemination) and post-approval (as the Nextel dealer would fill in the "reimbursement" bottom half of the page after the advertising was conducted). Three instances of Nextel pre- and post-approval and agreements to pay for 100% of Direct Connect's (a/k/a Direct Net) "American Blast Fax" "Fax Blast[s]" are attached as Exhibit 4.

These Nextel fax ad authorizations were signed in April, May & June, 2000 – eight to ten months after Nextel's legal department purported to advise its Regional Marketing VP's that "Nextel and its dealers [were] subject to the TCPA". The scope of Nextel's fax ad campaign

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limited to Nextel's fax advertising on behalf of only **3** of its Texas Nextel dealers (all of which were paid by Nextel to send out Nextel pre-approved fax ads). Restated, Nextel has never had to respond to this Commission or any private lawsuit regarding approximately ninety five percent (95%) of its Texas fax advertising in the year 2000 alone.

was, of course, known to Nextel. In June and August of 2000, a Nextel Marketing Manager and a Nextel Account Executive, for the same dealer, both signed an approval for a "Fax Blast throughout Houston, 200,000 faxes." See, Ex. ***5.*** Nextel paid for the Nextel fax advertising per its pre- and post-approval of same. See, Ex. ***6.***

This was not a first occurrence at Nextel (even in Texas alone). In September and October, 1999, the same Nextel Marketing Manager and a different account executive approved payments for fax advertising for two other Nextel dealers, the second to "[u]se Mad Fax Company to 'Blast Fax' 68,000 1 page flyers (attached) in the Houston area [in two months]". See, **Ex.** 7.

Both Nextel and the owner of another Nextel dealer, Constant Communications, have confirmed that Nextel both pre-approved and paid for Constant's blast fax ad campaigns, through December, 2000. See, Exs. 8 & 9.

In short, Nextel's representations that it was "not even an advertiser" and its "only role in the matter was largely administrative" *[Id.* at 39 & n. 84] do not square with the truth. See, Exs. 4-9. Nearly every one of Nextel's pre-approved fax ads purported to reserve the rights of "Nextel Communications, Inc." and stated: "Nextel, the Nextel logo (i.e. How business gets done) and Direct Connect are trademarks and/or service marks of Nextel Communications." See, Exs. 4, 8 & 11.

E. Nextel has a history of candor to regulatory authorities about its fax advertising.

By December of 2000, Nextel pre-approved and paid for Nextel fax ads to be sent on behalf of at least fourteen (14) Texas dealers alone. See, Ex. 3.

Nextel responded to an unsolicited fax ad complaint from the Texas Attorney General

that month stemming from Mr. Joe Shields complaints about his receipt of three Nextel Dealer unsolicited fax ads; two of which were Constant Communications and Direct Net Communications. See, Ex. 10 (pages stamped 0009-12 are Nextel's letter and the Nextel/Constant fax ad and pages stamped 00013-17 are Nextel's letter and three different Nextel/Direct Net fax ads). Nextel counsel, Mr. Frank Triveri, represented to the Texas AG that it "should not impute [sic] to Nextel the apparent acts [sic] of the three independent contractors, who acted on their own initiative without Nextel's involvement". See, Ex. 10 at p. 001.

This is extremely troubling to say the least. Nextel was responding, through counsel, to a public investigation by the office of an Attorneys' General. Even the most cursory inquiry (let alone an investigation which was warranted and no doubt conducted) would have revealed that Nextel had pre-approved and paid for hundreds of thousands of Nextel/Constant fax ads including the precise fax ad received by Mr. Shields. See, Exs. 4-6 & 11 (Nextel's approval of a fax ad identical to the one received by Mr. Shields attached as Ex. 10, bates 0016). Such cursory review would have also revealed that Nextel had pre-approved and paid for over 150,000 Constant fax ads. See, Exs. 8 & 9.

While Nextel has obviously known since at least early 2001 that Mr. Traveri's assertion that Nextel was not involved with the fax ads that the Texas Attorney General complained of was incorrect, at best, Nextel did not see fit to advise this Commission or apparently the Texas AG's office of its rather significant and substantive "error" in this regard.

In short, Nextel was hardly "unwitting", a "responsible telemarketer", nor was it candid with this Commission about why it was sued. And Nextel's transparent attempt to paint itself as a targeted defendant only because of its "perceived 'deep pockets'" [*Id.* at 24] is disingenuous

than arranging a "settlement conference" with my attorneys in Washington, D.C., held at Nextel's insistence on the very day that comments were originally due in this rulemaking and then offering to settle their TCPA liability for far less than 1 penny on the dollar all while stating that their considerable political clout with the FCC would allow them to evade their TCPA liability in its entirety.

Nextel has made a number of representations, under oath, to the Texas District Court in my case, which have been demonstrated to be incorrect. See, Exs. **5, 7** & 9.

II. Nextel's view **on** the Commission's creation of an established business relationship exemption for fax ads is contrary to that of **51** Attorneys' General, a George **W.** Bush Republican appointed Federal Judge and other conservative judges.

Within the past month (in December 2002) at least **5**1 Attorneys General submitted a consolidated brief containing "Comments and Recommendations" in this rulemaking. In pertinent part, these 51 AG's stated:

> [t]he Attorneys General respectfully submit that creating an established business relationship ["EBR] exemption runs contrary to the clear wording of the statute. The TCPA defines "unsolicited advertisement" as an ad[] sent to a person "without that person's prior express invitation or permission." An [EBR] exemption would rely on ***implied*** invitation or permission, which is contrary to the clear wording of the statute. That an existing business relationship is distinct from "express invitation or permission" is demonstrated by [] subsection [(a)(3)] of the TCPA immediately preceding the "unsolicited advertisement" subsection [(a)(4)].
>
> . . .
>
> Therefore, the fact that an [EBR] exemption is found in the "telephone solicitation" definition but *not* in the "unsolicited advertisement" definition means that missing exemption for an [EBR] should not be added by courts or the Commission to the "unsolicited advertisement" definition. For the reason that an [EBR] exemption for unsolicited faxes is contrary to Congress' intent, the states are opposed to the Commission providing such an exemption.

Pertinent parts of the AG's brief are attached as Exhibit 12, see, p. 42.

The position of these 51 Attorneys' General mirrors the opinion and ruling of a recent George W. Bush Federal judicial appointee, the Honorable David Godbey. Judge Godbey held:

> Here, the FCC's interpretation of the EBR defense would act to amend the TCPA's definition of an unsolicited advertisement from a fax sent without the recipients "prior express invitation or permission," to a fax sent without the recipient's prior express or implied invitation or permission. That interpretation conflicts with the plain language of the statute.

See, Ex. 13 at 4 (emphasis in original) Judge Godbey concluded, stating:

> With respect to faxes, then, in contrast to telephone solicitations, Congress intended to limit the effect of prior invitation only to express invitations; the FCC's interpretation would effectively delete that limitation from the statute. The Court cannot support an interpretation that reverses the effect of the words chosen by Congress. Accordingly, the Court holds that there is no "EBR or "implied permission" exception *to* the definition of unsolicited advertisement for faxes.

See, Ex. 13 at 5. (emphasis in original).'

Next, the FCC was correct in its original recognition that it had no discretion to create exemptions from the unsolicited fax ad ban. In footnote number 87 thereof, in a sentence immediately following this Commission's correct recognition that it was "without discretion to create exemptions from or limit the effects of the prohibition [on fax advertising]" this Commission purported to "note" just such an exemption – the same one rejected by the **U.S.** Congress – an EBR.[3]

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[2] Four other Republican judges have held that there is no established business relationship defense, exemption or exception to liability for the sending of an unsolicited fax ad under the TCPA. The Hon. Merrill Hartman (Dallas, Texas' 192nd Dist. Ct.), the Hon. Bill Rhea (Dallas, Texas' 162nd Dist. Ct.), the Hon. Tom Lowe (Tarrant County, Texas' 236th Dist. Ct.) and the Hon. Wayne Bridewell (Johnson County, Texas' 249th Dist. Ct.).

[3] In pertinent part the FCC stated:

Finally, there is another reason that the FCC had no authority to modify, regulate or define the definition of "unsolicited advertisement" for faxing in subsection (a)(4) of the TPCA. The TCPA states:

> The [Federal Communications] Commission ***shall*** prescribe regulations to implement the requirements of this ***subsection***.

47 U.S.C. § 227(b)(2)(em. added). Congress, of course, knew the difference between a section and a subsection. This distinction demonstrates that Congress mandated the FCC to enforce the ban on unsolicited fax advertising but did not provide the FCC authority to change the definition of an unsolicited fax advertisement (eg. engraft an EBR defense for fax advertising).

In pertinent part, the definitions set forth in subsection (a) of the TCPA apply to "this section" or, all of the TCPA, which is set forth in Section 227. However, the FCC's authority is limited to "prescrib[ing] regulations to implement the requirements of this subsection" which is contained in subsection (b) of Section 227. The definition of an "unsolicited [fax] advertisement" is contained in subsection (a), hence, the FCC did not have authority to interpret that definition or enlarge it with an "EBR defense". 47 U.S.C. § 227(b)(2), (a)(4) & (b)(1)(c))[4]

> **[SENTENCE #1]** The TCPA further prohibits the **use** of telephone facsimile machines to send unsolicited advertisements. **[#2]** In banning telephone facsimile advertisements, ***the TCPA leaves the [Federal Communications] Commission without discretion to create exemptions from or limit the effects of the prohibition (see § 227(b)(1)(C)); thus, such transmissions are banned in our rules as they are in the TCPA.*** § 64.1200(a)(3). **[#3]** We note, however, that facsimile transmissions from persons or entities who have an established business relationship with the recipient can be deemed to be invited or permitted by the recipient. See para. **34,** supra [which solely pertains to telephone solicitations]

FCC, In the Matter of the Rules and Regulations Implementing the TCPA, (92-90)(October 16, 1992), ¶ 54 &footnote **87.** (em. added)

[4] Subparagraphs (b)(2)(A), (B) & (C) define what the FCC "shall" and "may" do, respectively, "[i]n implementing the requirements of this subsection". 47 U.S.C. § 227(b)(2)) No reference in those subparagraphs relates to subparagraphs (a)(4) or (b)(1)(C) the definition of an unsolicited advertisement

Even assuming ***arguendo*** that the first sentence of (b)(2) gave the FCC authority to "prescribe regulations to implement the requirements" of (a)(4) and/or (b)(1)(C), as those subparagraphs together contain the complete ban on fax ads, the result is the same, any such regulation must implement the requirements of that complete ban and not limit that complete ban or create exemptions for it as the FCC has acknowledged.

III. Nextel's request that the TCPA's definition of a fax machine be changed defies English and would effectively eviscerate the TCPA's fax ad ban.

A. Plain English

The 1991 Telephone Consumer Protection Act ("TCPA") makes it

> unlawful for any person within the United States - (C) to use any telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine;

47 U.S.C. § 227 (b)(1) & (b)(1)(C). The statute defines what a fax machine is under the TCPA, providing:

> **As** used in this section - (2) The term "telephone facsimile machine" means equipment which has the capacity **(A)** to transcribe text or images, or both, from paper into an electronic signal and to transmit that signal over a regular telephone line, or (B) to transcribe text or images (or both) from an electronic signal received over a regular telephone line onto paper.

47 U.S.C. § 227 (a) & (a)(2).

In addressing Nextel's request to exclude computers and fax servers from the TCPA's definition of a "telephone facsimile machine" the Commission need not determine what is understood in the facsimile industry or by the consuming public to constitute a "telephone

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and the complete ban on unsolicited fax ads, respectively.

facsimile machine". For receiving equipment under the TCPA that term "means equipment which has the capacity ... (B) to transcribe text or images (or both) from an electronic signal received over a regular telephone line onto paper." 47 U.S.C. § 227 (a)(2) & (a)(2)(B). "When a word is not defined by statute, we normally construe it in accord with its ordinary or natural meaning." *Smith v. United States, 508* U.S. 223,228-29 (1993)(quoting Webster's).

Merriam-Webster's Dictionary defines "equipment" as:

> the set of articles or physical resources serving to equip a person or thing []: the implements used in an operation or activity

Merriam-Webster OnLine, Ex. "14A".

Cambridge's Dictionary defines "equipment" as:

> Equipment is the set of necessary tools, clothing etc. for a particular purpose
> *office equipment*
> *camping equipment*
> *kitchen equipment*
> *a basic piece of household equipment*
> *electrical equipment*
> *The soldiers had to carry equipment on their backs for miles.*

Cambridge Dictionaries Online, Ex. "14B".

Roget's Thesaurus defines "equipment" as:

> Things needed for a task, journey, or other purpose: accouterment (often used in plural), apparatus, gear material (used in plural), material, outfit, paraphernalia, rig, tackle, thing (used in plural), turnout.

Roget's II: The New Thesaurus (3d Ed. 1995), Ex. "14C".

Ordinarily and naturally, "equipment" is almost exclusively used in the plural. This means that a "telephone facsimile machine", under the TCPA, can include more than the initial device which receives a fax ad and includes peripheral equipment which together with that device have the capacity to print the fax ad.

B. Application of plain English to the testimony of Nextel's facsimile expert

Nextel presented a facsimile expert at the class certification hearing in my case; Mr. Michael Goodman. Mr. Goodman testified that every device that he h e w of in the world that had the capacity to receive a fax transmission had the capacity with a printer and a command to print the fax ad. Ex. "15". This includes Palm Pilots, cell phones and fax servers – each of them when coupled with a printer are "equipment" (which almost exclusively means plural) which can print a fax ad.

C. The TCPA's fax ad prohibition used broad and intentionally ambiguous words on the sending side to **avoid evasion and had no need to do so on the receiving side.**

The reason for the words "computer or other device" exist on the sending side of (a)(2) but not on the receiving side comes from the clear Congressional intent to make ***all*** unsolicited fax ad transmissions unlawful – would be violators have control over the sending devices but no control over the receiving equipment. Hence, removing the words "or other device" from the sending side of the equation allows a would-be violator to use a device such as a print test transmitter (commonly attached to printers in computer and electronics stores) to send the unlawful fax ad and because such device is not capable of receiving a fax it permits evasion of the TCPA.

However, as Nextel's own expert testified all devices that can receive a fax ad transmission when coupled with a command and a printer can print same. See, Ex. "15". Hence, there was no need for the redundancy of "computer or other device" on the receiving end because in both 1991 and today a would-be TCPA violator can not and should not be able to evade the TCPA by paying to have others send out hundreds of thousands of fax ads on its behalf and then evade liability by the fortuity that some of them were received by a computer or fax

server. Therefore, the inclusion of those words were not surplusage. To accomplish Congressional intent to make all unsolicited fax ad transmissions unlawful it was necessary to use intentionally broad words, like "computer", and patently ambiguous terms, like "or other device", to ensure that every conceivable and yet to be conceived device was covered.

It is a violation of the TCPA "to use any . . . device to send an unsolicited ad". 47 U.S.C. § 227 (b)(1)(C). A recipients utilization of a computer, fax server or other intermediary device does not transform an unlawful unsolicited fax ad transmission into a legal one, for in each instance the advertiser has still used a device to send an unsolicited ad to equipment which constitutes a fax machine under the TCPA.[5]

D. The FCC has no authority to rewrite (a)(2) or change the meaning of the word equipment to a singular concept and doing so would effectively nullify any deterrent effect of the TCPA.

The same rationale for why the TCPA does not provide the FCC authority to redefine an "unsolicited advertisement" set forth in subsection (a)(4), because it only has authority over subsection (b) [see (b)(2)], applies equally to the FCC's lack of authority to redefine the definition of a "telephone facsimile machine" in (a)(2).[6]

If the Commission disagrees, it should clarify that "equipment" means what is set forth in

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[5] The fact that the Commission ruled that "[f]axmodem boards are the functional equivalent of stand-alone fax machines" in relation to the sending apparatus (to disallow TCPA evasion), Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 10 FCC Rcd 12391 ¶ 29 (1995), is perfectly consistent with the conclusion that evasion should similarly be disallowed by permitting senders to redefine the word "equipment" in the singular.

[6] This Commission has correctly recognized its lack of authority in this regard. "In banning telephone facsimile advertisements, ***the TCPA leaves the Commission without discretion to create exemptions from or limit the effects of the prohibition (see § 227(b)(1)(C)); thus, such transmissions are banned in our rules as they are in the TCPA.*** § 64.1200(a)(3)." In the Matter of the Rules and Regulations Implementing the TCPA, (92-90)(October 16, 1992), ¶ 54 & n. 87. (em. added)

Webster's, Cambridge's and Roget's Thesaurus and, therefore, so long as the initially receiving device has the capacity to print a fax in conjunction with a printer it constitutes a "telephone facsimile machine" under the TCPA. The only other option is to redefine the word "equipment" to mean a singular device would require ignoring the ordinary and natural meaning of the word "equipment"; which is almost always used in the plural.

If the FCC purported to so change this definition, notwithstanding the fact that the response would likely be as uniform as when the FCC engrafted an EBR exemption for fax ads (51 AG's and a Bush appointed federal judge disagree), it would, if adopted effectively render the TCPA deterrent intent a nullity. Blast fax advertisers like Nextel could then continue to pay for hundreds of thousands of fax ads and because no one (even with ABF or Fax.Com fax confirmation logs) could disprove the possibility that some of the fax ads were received on computer modems, the advertisers would then argue that proof that a "stand-alone fax machine" received their ad is an element of a TCPA claim. If this were true, which it is not, fax advertisers could then argue that they have the right to inquire of each TCPA claimant of the type of device that received their unsolicited fax ad making class actions unmanageable and uncertifiable.

E. The purpose **of** the **TCPA's** fax **ad** ban **is** not **limited to** the cost **of** paper.

Nextel attempts to buttress its requested rewriting of the TCPA's definition of a "telephone facsimile machine" and its constitutional arguments with the claim that "Congress was concerned primarily with the printing costs associated with the receipt of an unsolicited fax ad[] by a conventional stand-alone fa[x] mahcine." *Id.* at 33-34. A number of federal courts disagree with Nextel:

> Congress was concerned with more than the cost of fax paper ... Congress designed a remedy that would take into account the *difficult to quantify* **business**

interruption costs imposed upon recipients of unsolicited fax ad[s]...

Kenro, Inc. v. Fax Daily, Inc., 962 F.Supp. 1162,1166 (S.D.Ind. 1997)(em. added). Just months ago in the Minnesota AG's suit against an ABF successor, the Court stated:

> The U.S. [argues] that the [TCPA] is more properly analyzed as an anti-conversion statute because its purpose is to prevent the shifting of advertising costs (paper, toner, ***human resources, business disruption)...***

Minnesota v. Sunbelt Communications [f/d/b/a ABF], 2002 WL 31017503 * 2 (D. Minn. 2002)(em. added).

The difficult to quantify business interruption costs and human resources which are expended when fax machines are used for advertising junk as opposed to retrieving critical business messages is similar if not exacerbated when an unlawful fax ad is received on a computer even if forwarded to e-mail and never printed. See, Comment of James M. Suggs, Jr. (filed in this Rulemaking). Every person who uses e-mail knows that unless you are 100% sure that a communication is non-business related you have to open it to exclude the possibility – which depending on modem speed and internet traffic can take longer than standing up to go get a junk fax off the machine. Worse yet, if you're concerned, as most people in America are, about computer viruses you have to spend even more time to quarantine and identify an unknown attachment, which may take 5, 10, 20, 30 minutes or more, all to later learn it is only yet another unsolicited fax ad.

F. Nextel's First Amendment justification for its request that the FCC re-write the **TCPA** and change the plain-English definition **of** the word "equipment" should fail.

Nextel's request that this Commission rewrite the TCPA as "the Commission can and should avoid constitutional problems" [Nextel Comment at 37] is based on its refuted false notion that the term "telephone facsimile machine" as defined in (a)(2) excludes "devices that

cannot ***independently*** transcribe advertising copy ... onto paper." ***Id.*** (italics added). Of course, Nextel's use of the word "independently" demonstrates that it either chose to ignore or act like the word "equipment" was not contained in the definition.

Nextel's constitutional arguments exclusively focus on its demonstrated-to-be erroneous belief that the sole purpose of the fax ad portions of the TCPA was to save the cost of paper and toner.

From these false premises, Nextel asks this Commission to speculate on the constitutionality of the TCPA as rewritten to achieve Nextel's objectives. In doing so, Nextel omits this Commission's less than five month old proclamation of what its approach to constitutional challenges should be. This Commission stated:

> administrative agencies are to presume that the statutes that Congress directs them to implement are constitutional.

In the Matter of Fax.Com, Inc.. Notice of Apparent Liability for Forfeiture, EB-02-TC-120 (August, 2002), at 9 & n. 34, citing, *Johnson v. Robinson,* 415 U.S. 361,368 (1974)(quoting Oestereich v. Selective Service Board, 393 U.S. 233, 242 (1968)(Harlan J., concurring in result)("Adjudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdictions of administrative agencies."))

IV. Addressing Section **217** is outside the scope of the Rulemaking at issue - nonetheless, **if** addressed, Section **217** clearly constitutes **an** additional basis for Nextel's liability.

Since 1934, Section 217 of Title 47 of the U.S. Code has provided:

> In construing and enforcing the provisions of this chapter [of which the TCPA is a part], the act, omission, or failure of any officer, agent, or other person acting for or employed by any common carrier or user, acting within the scope of his employment, shall in every case by also deemed to be the act, omission, or failure of such carrier or user as well as that of the person.

Both the TCPA (Section 227) and this 68 year old law expanding common carrier liability for the acts of others (Section 217) are contained in Chapter **5**, Subchapter II, Part I "Common Carrier Regulation" of the 1934 Telecommunications Act. Nextel has asked this Commission to go beyond anything set forth in the NPRM and rule that Nextel is not liable under this statute. *Id*. at **38.**

I submit that three of three FCC rulings on the subject, on the comparable Chapter **5** violations of "slamming and cramming" are directly on point. In the first, the common carrier:

> argue[d] that it relied solely upon independent contractors to market its services, and that it cannot be held liable for their misconduct. Section 217 of the [1934 Telecommunications] Act, however, expressly imposes liability on carriers for the acts of their independent contractors.

AT&T Corp. v. Winback, FCC Mem. Opin. & Order, 2001 WL 951018, ¶ 21 & n. 56. Despite other arguments precisely like Nextel's,

> [t]he [FCC] has ruled on numerous occasions that carriers are responsible for the conduct of third parties acting on the carrier's behalf, including third party marketers.

In the Matter of Long Distance Direct, FCC Mem. Opin. & Order, 2000 WL 177864, ¶ 9(Common carrier "asserts that the acts at issue [slamming and cramming] were those of an independent contractor", and points out that it "ended the relationship with" such independent contractor. The Commission fined the common carrier $2,000,000.00 for its first offense).

In the same matter, the Commission directly refuted Nextel's present Section 217 argument:

> [The common carrier] is not relieved of liability merely because it directed [the independent contractor to follow the] law. Section 217 of the [1934 Telecommunications] Act deems "the act, omission or failure of any ... person acting for or employed by " any carrier to be the act, omission or failure of that carrier. This language is extremely broad and clearly extends to [the independent contractor] which was "acting for" [the common carrier in slamming long distance accounts].
>
> To hold that the section [217] does not include independent contractors would create a gaping loophole in the requirements of the Act and frustrate legislative intent.

Id. at ¶ 9.

The presumption in these slamming and cramming holdings by the FCC was that the carrier had no knowledge of the unlawful acts being committed by independent contractors on their behalf, yet they were held liable nonetheless under this "extremely broad" 68 year old law. Here, of course, Nextel does not have the "defense" that it did not know of their independent contractors were sending unsolicited fax ads on their behalf, they pre-approved and paid for hundreds of thousands of fax ads. See, Exs. 3-9 & 11. Section 217, therefore, while unneeded is merely an additional basis to hold a common carrier liable - a carrier which in this instance truly had others "acting for" it to violate Chapter 5 of the 1934 Telecommunications Act.

V. Nextel's requests to change who is liable under the TCPA, or why, should not be made.

Nextel sought a summary judgment in my case and it was appropriately denied. Nextel has and is exercising its appellate rights, the Commission should not countenance Nextel's requests to be exonerated from TCPA liability through its requests that the TCPA be rewritten, let alone based on the incomplete and inaccurate record it has provided the FCC.

Nextel's request that the Commission overturn its 1995 holding that "the entity or entities on whose behalf facsimiles are transmitted are ultimately liable for compliance with the rule" should be rejected. First off, contrary to Nextel's assertion it was not an "innocent bystander [pulled] into the fray" *[Id.* at 39] as Nextel pre-approved and paid for hundreds of thousands of fax ads to be sent in its name to sell its products. See, Exs. 3-9 & 11. Second, whether or not the Commission's correct ruling - that advertisers are liable for a fax advertising ban - results in what Nextel calls "strict liability" is, therefore, not relevant to Nextel's appropriate plight; nor is it true. In the only case that I am aware of where a parent corporation knew nothing of a subsidiaries fax advertising

on its behalf, the parent was quickly excused from the case on a summary judgment. ***Monarch v. Hilton***, Case No. 348-186784-01; in the 348 District Court of Tarrant County, Texas.

Nextel did not cite nor do I know of a case holding a truly innocent and, therefore, ignorant company liable for someone else having sent fax ads that advertised its products and services. Therefore, no modification need be made to the Commission's correct holding in 1995 that "the entity or entities on whose behalf facsimiles are transmitted are ultimately liable for compliance with the rule [banning unsolicited fax ads]".

Nextel then suggests that only "the party (or parties) determining the destination of the fa[x] ad[] [should be] liable for any violation of the TCPA" and that "parties who do not have control and have no knowledge of the destination of these ad[s] are not liable for such activities." *Id.* at 40. When two Nextel top marketing employees signed a Nextel created form specifically authorizing a "Fax Blast throughout Houston, 200,000 Faxes" [Ex. 5] is Nextel asserting that it did not determine the destination or had no control or knowledge of the destination?! Does Nextel expect this Commission to believe that when it pre-approves Nextel fax ads for Houston area Nextel dealers and agrees to pay for their blast faxes before they are sent that it does not have knowledge - or control through denial of approval and/or payment - over where those faxes will be sent?! Or, is Nextel advocating a rule that fax advertisers can avoid liability by hiring someone to send fax ads out - or paying their authorized dealers to send fax ads out - and as long as they remain ignorant about either the general or precise target locations of their fax ads that they should not be liable?!

The FCC is obviously correct that fax advertisers who pay to have fax ads sent on their behalf are liable for violations of the TCPA and that fax broadcasters are only liable based on a high

degree of involvement or knowledge that no prior express invitation or permission had been obtained. No change in this regard need be made.

VI. Conclusion

The Senate sponsor of the TCPA, Senator Hollings stated that "[u]nless Congress makes it easier for consumers to obtain damages from those who violate this bill, these abuses will undoubtedly continue." 137 Cong. Rec. S16204-01, 205 (daily ed. Nov. 7, 1991). At a minimum, therefore, the legislative history evidences an intent to make it easy "for consumers to obtain damages" in order to effectuate the complete ban on fax advertising. Otherwise "these abuses will undoubtedly continue."

As we know now, Senator Hollings could not have been more correct in hispredictions. Not only was the TCPA passed, but despite million dollar FCC fines (including over $5 million against Fax.com), enforcement suits by at least four Attorneys General, less than seven TCPA private class action settlements in the history of America, Nextel committed all of its violations ofthe TCPA after all of these attempts to effectuate the ban on unsolicited fax advertising. Perhaps most importantly, Nextel committed all of its TCPA violations six years after it was ordered, as a common carrier, to comply with the TCPA and one year after its legal department advised all of its top marketing personnel nationwide that Nextel and its dealers were subject to the TCPA. Therefore, even with any present or future class action being successful, but undoubtedly without, the very abuses Senator Hollings spoke of "will undoubtedly continue."

A number of statements in the same congressional report that Nextel has relied on in Coontz v. Nextel further evidence the need to disallow Nextel's requested exoneration from TCPA liability through a re-writing of same:

> Computerized calls are the scourge of modem civilization. *[Id.* at 205, **Ex.** 2]
>
> ...
>
> It is telephone terrorism, and it has got to stop. *[Id.]*
>
> ...
>
> Not one party at the hearing testified in opposition to the bill. Because of the enormous public support.. .*[Id.* at 205]
>
> ...
>
> ...these changes have been fully shared and explored with the members of the industry.. .who support this bill. There is no significant opposition to this bill. *[Id.* at 206]
>
> ...
>
> ..telemarketers must learn not to take advantage of their technology.. .they must learn not to tie up the telephone or fax lines of business without prior consent. ...there is overwhelming support for both of these bills, and these substitute versions reflect a substantial input of the telemarketing industry. *[Id.* at 208]
>
> ...
>
> Mr. [Lloyd] Bentsen. Mr. President, I join my colleague ...in supporting the immediate passage of this bill. ...this bill addresses an issue of great concern to many of my Texas constituents and people all over the country: The unreasonable encroachment upon their privacy by unsolicited, automated telephone calls.. .and by the unsolicited use of facsimile machines to transmit advertising.
>
> ...
>
> Furthermore, it would ban all unsolicited advertising to facsimile machines. *[Id.* at 208].

137 Cong. Rec. S16204-01.

Senators Hollings, Inouye and Bentsen all recognized "the scourge" of "junk fax" advertising and each of their comments strongly evidence Congressional intent that the scourge be stopped.

The scourge will undoubtedly continue unless:

a) the FCC heeds the words of 51 Attorneys' General and a Bush federal judicial appointee and abandons the established business relationship exemption for unsolicited fax ads; and

b) rejects the fax advertisers' position that "equipment" must be interpreted in the singular to exclude all initial receiving devices except "stand-alone fax machines" and clarify that "equipment" is plural, and, therefore, includes all devices which have the capacity to print out a fax